KONG CHUNG SIEW & ORS.

v.

NGUI KWONG YAW & ORS.

HIGH COURT SABAH & SARAWAK, SIBU
CHONG SIEW FAI J
[SUIT NO. 175 OF 1986]
2 MAY 1992

LAND LAW: *Tenancy - Factors that determine the nature of a tenancy - Notice to quit - Partition or sale of land - High Court has jurisdiction to order - Section 25(2) Item 3 Schedule of Court of Judicature Act 1964.*

CIVIL PROCEDURE: *Summary judgment under O. 14 - Can be entered on affidavit evidence only where substantial enough - Counterclaims do not entitle a defendant leave to defend - Joinder - Effect of misjoinder - Mesne profits to run from date of service of notice to quit.*

ADMINISTRATIVE LAW: *Improper to raise the issue of validity of the repeal of Rent Control Ordinance (Cap 86) by way of defence unless the relevant public authority was a party - Audi alteram partem - Natural justice would be breached if matter was heard in the absence of affected party.*

The defendants were occupying a shophouse jointly belonging to the plaintiffs and the 1st defendant, paying a monthly rent. Notice was served on 2 August 1985 determining the tenancy but the defendants did not vacate the premises. In an O. 14 application the plaintiffs claimed on the ground that defendants had wrongfully held over:

A. **As against all 4 defendants**

(i) Possession of ½ undivided right title share and interest in the shophouse.

(ii) *Mesne* profits from 1 October 1985 till possession.

B. **As against the 1st defendant**

(i) For partition of the shophouse in agreed shares or for the sale of the shophouse with the net proceeds of sale to be equally divided.

The defendants, however, contended that:

(i) The plaintiffs were not entitled to summary judgment as they could not sue the 4th defendant-firm and its partners together in respect of the same liability and since the 4th defendant, being a non-legal person, could not hold a tenancy.

(ii) They had acquired the status of protected tenants under the Rent Control Ordinance (Cap. 86) and would not lose that right even though the Ordinance had been repealed by the Rent Control Ordinance 1984 because the repeal had been unlawful and invalid.

(iii) Even if the repeal was valid, the right accrued was ensured by ss. 10(b), (c) and (e) of the Interpretation Ordinance (Cap 1), and Article 13(1) and (2) of the Federal Constitution.

(iv) The notice to quit was not valid in light of their status as protected tenants or, alternatively, even if they had no such right, the notice itself was improper as only one month's notice had been given despite the defendants being tenants from year to year.

(v) Counter-claims having been made, they were entitled to leave to defend.

Held:

[1] The partners in a firm can be sued in the name of the firm (O. 77 r. 1) and the contention that the defendant-firm could not hold a tenancy as it was a non-legal person, was devoid of merit. (*Alagappa Chettiar v. Coliseum Cafe; Eng Chuan & Company & Ors. v. Four Seas Communications Bank Ltd.*). Alternatively, the action would not be defeated by reason of misjoinder of any party (O. 15 r. 6(1), in the instant case, the proper party had been made a party to the action for determining the issues.

[2] It is a crucial principle of justice that a challenged party be afforded an opportunity to be heard. It was therefore improper for an issue of public law involving a public authority to be raised by way of defence where the authority was not a party to the action.

[3] Rights acquired through statutory protection aimed at protecting parties for the time being while the statute is in force do not fall within the scope of acquired rights within the meaning of s. 10(c) of the Interpretation Ordinance (cap 1). Furthermore, the defendants were not even entitled to the statutory rights claimed as they were not statutory tenants within the meaning of the Rent Control Ordinance (cap. 86). There was therefore no violation of Article 13 of the Federal Constitution.

[4] The provision of rent and the manner in which it is paid are important factors in determining the nature of tenancies. From the evidence, the tenancy was a monthly one and the notice to quit was therefore proper.

[5] The mere fact that counterclaims are made does not necessarily entitle a defendant to grant of leave to defend in summary proceedings, especially where the counterclaims are based on defences that have been substantially disposed of as constituting no triable issues.

[6] Summary relief can be granted on affidavit evidence only where it is substantial enough. The evidence adduced in support of the claim for partition was too vague and insubstantial. A trial of the issues would therefore be required.

[7] The plaintiffs were entitled to possession of ½ undivided right title share and interest in the shophouse. The defendants were to pay the *mesne* profits at the rate of RM170 month (the agreed monthly rental) from 1 October 1985 till possession of ½ of the shophouse was delivered.

[8] Though the Court has power to order partition or sale of land under s. 25(2) and item 3 of the Schedule to the Judicature Act 1964, no such order was made, as the claim for relief should be subject to trial.

[9] Since the plaintiffs succeeded partially, in their application, only half of the costs were to be paid by the defendants to the plaintiffs.

Cases referred to:

Chop Cheong Tuck v. Chop Tack Loong & Ors. [1934] MLJ 176 ***(refd)***
Madam Lal & Anor. v. Ho Siew Bee [1983] 1 MLJ 105 ***(refd)***
Alagappa Chettiar v. Coliseum Cafe [1962] 28 MLJ 111 ***(refd)***
Eng Chuan & Company & Ors. v. Four Seas Communications Bank Ltd. [1982] 2 MLJ 81 ***(refd)***
Ah Thian v. Government of Malaysia [1976] 2 MLJ 112 ***(refd)***
Hashim b. Saad v. Yahaya b Hashim & Anor. [1973] 2 MLJ 85 ***(refd)***
Yeoh Tat Thong v. Government of Malaysia & Anor. [1973] 2 MLJ 86 ***(refd)***
Wandsworth London Borough Council v. Winder [1984] 3 All ER 83 ***(dist)***
Avon County Council v. Buscott [1988] 1 All ER 841 ***(dist)***
Sifam Electrical Instrument Co. Ltd. v. Sangamo Weston Ltd. [1971] 2 All ER 1074 ***(foll)***

Abbott v. Minister of Lands [1895] AC 425 ***(refd)***
M.K. Ramasamy Pillai v. Meyappa Chettiar & Anor. [1955] 21 MLJ 105 ***(refd)***
Tan Khio Soei & Anor. v. Ban Hin Lee Bank Ltd. [1964] 30 MLJ 71 ***(refd)***
Hamilton Gell v. White [1922] 2 KB 422 ***(refd)***
Kenderaan Bas Mara v. Yew Bon Tew & Anor. [1980] 1 MLJ 211 ***(refd)***
Moore v. Dimond [1929-30] 43 CLR 105 ***(refd)***
Lee Ah Low v. Cheong Lep Keen & Anor. [1970] 1 MLJ 7 ***(foll)***
Leong Lep Keen & Anor. v. Tan Tin Kek [1968] 2 MLJ 126 ***(foll)***
Adler v. Blackman [1952] 2 All ER 945 ***(foll)***
Ko Teck Kin v. Watkinson [1961] 27 MLJ 73 ***(refd)***
Muhamed Din v. Sockalingam Chettiar [1946] 12 MLJ 134 ***(refd)***
Anglo-Italian Bank v. Wells & Davies [1878] 38 LT 197 ***(foll)***
Canas Property Co. Ltd. v. K.L. Television Services Ltd. [1970] 2 QB 433 ***(refd)***
G.P. de Silva & Ors. v. Chua Yam Thong [1962] 28 MLJ 236 ***(dist)***

Legislation referred to:
Federal Constitution, arts. 13(1), (2)
Courts of Judicature Act 1964, s. 25(2),schedule para.3
Interpretation Ordinance (Cap 1) (Sabah), ss. 10(b),(c), (e), s. 15 proviso (b)
Land Code (Cap 81) (Sarawak), s. 129
Rent Control Ordinance (Cap. 86), ss. 3, 18
Rules of the High Court 1980, O. 14, O. 15 r. 6(1), O. 77 r. 1
Copyright Act 1956 [UK], s. 10
Interpretation Act 1889, s. 38(2)(c)
Rules of the Supreme Court, O. 113

Other sources referred to:
Mallal's Supreme Court Practice, 2nd Edn., Vol. 1, para. 77/5/9
Law of Landlord and Tenant, Woodfall, 28th Edn., Vol. 1 para. 1-0642
Law of Landlord and Tenant, Hill and Redman's, 16th Edn., p. 44

For the plaintiffs - Dr. Chew Peng Hui; M/s. Battenberg & Talma
For the defendants - Stephen Chung; M/s. Stephen Chung

JUDGMENT

Chong Siew Fai J:

This is an application for summary judgment under O. 14 of the Rules of the High Court 1980, by the plaintiffs who sue as the trustees of the Sibu Hakka Community Benevolent Society, Sibu (the Society):

A. against all the 4 defendants for:

(1) possession of ½ undivided right title share and interest in the shophouse No. 19, Channel Road, Sibu, and comprised in Sibu Lease of Crown Land No. 43547 (the shophouse);

(2) mesne profit from 1 October 1985 till possession is delivered up to be assessed by the Court;

B. against the 1st defendant for an order of partition of the shophouse in equal shares in such manner as the Court shall deem fit and proper, or alternatively, for the sale of the shophouse with the nett proceeds of sale to be equally divided between the Society and the 1st defendant.

There is also a claim for costs.

The application is supported by an affidavit jointly made by the 3 plaintiffs as trustees of the Society on 15 October 1986. For the defendants, the 1st defendant made an affidavit on 30 April 1987.

In the indorsement of claim on the writ of summons and in the statement of claim, there is a claim for "damage". Since this is not included in the O. 14 application it must, at least for the purpose of this application, be taken to have been abandoned. The defendants also filed a "defence and counterclaim" to which the plaintiffs answered by a "defence to counterclaim".

Before dealing with the merits of the application, 2 matters need be mentioned:

1. Respecting the plaintiffs' claim for the mesne profit, I had, at the commencement of the hearing, on the application of the plaintiffs and despite the objection of the defendants, allowed the amendment of the year "1986" to read "1985". My ruling appears in the notes of proceedings.

2. Following an objection on behalf of the defendants, paras. 5, 6 & 7 of the plaintiffs' affidavit and Exhs. 'B', 'C' and 'D' annexed thereto were held inadmissible on the ground that they were or related to matters raised in negotiations conducted on "without prejudice" basis. My ruling on this point also appears in the notes of proceedings. As a consequence, para. 9 of the 1st defendant's affidavit in answer to the said 3 paragraphs may be ignored. In considering this application, therefore, I place no reliance on any of the said paragraphs and the exhibits.

It is not disputed that the Society and the 1st defendant Ngui Kwong Yaw are the registered co-proprietors of the shophouse each holding ½ undivided right title share and interest therein, and that the 1st, 2nd and 3rd defendants are the registered partners of the 4th defendant-firm Chop Tong Chiang. It is also common ground that the shophouse was subject to the Rent Control Ordinance (Cap. 86) the validity of the repeal of which is, however, in issue.

The case of the plaintiffs is that the 4th defendant firm was the monthly tenant of the Society holding the ½ undivided share of the shophouse belonging to the Society and paying a monthly rental of RM170, that the tenancy had been terminated by a notice to quit dated 2 August 1985 and that thereafter the defendants have wrongfully held over, refused and deprived the Society of the use of its ½ share of the shophouse.

As for the rental, the plaintiffs concede that the defendants had paid the rental up to 30 May 1985, and that the rentals for the months of June, July, August and September 1985 though tendered were refused acceptance because of the service of the notice to quit.

The defendants contested the application. Several grounds were raised.

Firstly, it was contended for the defendants that the plaintiffs were not entitled to summary judgment because the plaintiffs could not sue the 4th defendant-firm and its partners together in respect of the same liability and because the 4th defendant-firm could not be sued since, not being a legal persona, it could not hold a tenancy. Counsel referred to *Mallal's Supreme Court Practice* 2nd Edn., Vol. 1, para. 77/5/9 where *Chop Cheong Tuck v. Chop Tack Loong & Ors.* [1934] MLJ 176 was cited, and also to *Madam Lal & Anor. v. Ho Siew Bee* [1983] 1 MLJ 105.

The first thing to note is that partners in a firm may be sued in the name of the firm (O. 77 r. 1). I find the contention that the defendant-firm could not be sued because it, not being a legal person, could not hold a tenancy, devoid of merit. In *Alagappa Chettiar v. Coliseum Cafe* [1962] 28 MLJ 111 CA the firm was sued. As to the effect of a tenancy granted to a partnership-firm, Good JA said (p. 116):

> If this is a lease, the partners are joint lessees; if it is not, they are trading as partners and occupy the premises for the purposes of the partnership business and they are jointly liable, under the law of partnership, for the obligations of the tenancy; and they enjoy community of interest in the partnership assets, which would include a tenancy of the premises in which the partnership business is carried on.
>
> ... I agree ... that this was a letting by the previous landlord to the persons who for the time being were partners carrying on business under the name of the Coliseum Cafe; and I have no hesitation, on the law, in holding that such a letting created the relationship of landlord and tenant between the previous landlord on the one hand and the partners on the other.

In *Tan Tiong Tee v. Leong King Siew & Anor.* [1953] Sarawak, N. Borneo and Brunei Supreme Court Reports 1, Blagden Ag. J spoke along the same vein respecting firms bearing, as in the instant case, the prefix "Chop". He said (p. 8):

> Those persons could use their own individual names if they wished followed by some such words as "trading in partnership" whenever they transacted any written business, but this might well be inconvenient, especially if there were numerous partners; and the obvious solution is to select one short name to include all the partners. This is the "Chop" name.

It may be noted that no objection appears to have been taken in the Privy Council case of *Eng Chuan & Company & Ors. v. Four Seas Communications Bank Ltd.* [1982] 2 MLJ 81 PC a tenancy case where the firm was sued.

Assuming I am wrong on this point, the application or the action in my view would nevertheless not be defeated solely on this ground because both the firm and its partners are made defendants in this action. That being so, the pertinent question is not so much which of them should be sued, (that is, the firm or its partners or both) but rather the effect of the situation obtained. In *Chop Cheong Tuck, supra,* the parties considered improperly joined were struck out and the case proceeded. Under O. 15 r. 6(1), a cause will not be defeated by reason of misjoinder of any party and in the instant case, the proper party, (that is, whether it be the 4th defendant-firm or its partners) has been made a party to the action for determining the issues in dispute by the Court.

As regards the 1st defendant, it must be remembered that he is a co-proprietor of the shophouse, and the plaintiffs also claim for partition or sale.

Another point to consider is about the validity of the repeal of the Rent Control Ordinance (Cap. 86). For the defendants it was contended that the repeal of the Rent Control Ordinance was unlawfully brought into force.

I should perhaps add that the defence of the defendants does not appear to be seriously challenging the repeal of the said Ordinance for it is thus pleaded in para. 5 of the defence:

> The defendants ... maintain that their continued possession and occupation ... was acquired under and by virtue of the provisions of the Rent Control Ordinance (Cap. 86) Sarawak before its repeal and they remain protected there under unaffected by its subsequent repeal **whether or not** such repeal was lawfully brought into force **which the defendants deny** ...
>
> (emphasis added)

The basis upon which this contention rested may be briefly stated as follows. The Rent Control (Repeal) Ordinance 1984 which repealed the Rent Control Ordinance (Cap. 86) provides that it "shall come into force on such date as the Chief Minister may by notification in the Gazette appoint".

By Gazette Notification (Swk LN 64) dated 27 November 1984 the Chief Minister appointed 1 February 1985 as the date on which the said 1984 Ordinance was to come into force. However, by *Gazette* Notification (Swk. LN4) dated 25 January 1985, Notification Swk. LN 64 was revoked and a different date, that is, 31 May 1985 was appointed. Counsel argued that since the Chief Minister had exercised his power of appointment by Notification Swk. LN 64, he was *functus officio* and the 2nd appointment *vide* Notification Swk. LN4 of 1985 was bad with the result that the 1984 Ordinance had not been brought into force and that the Rent Control Ordinance was still the law. Proviso (b) to s. 15 of the Interpretation Ordinance (Cap. 1) was cited in support. Hence, the defence involves the allegation of legality or otherwise of the exercise of appointment of date by the Chief Minister and the question of whether the Rent Control Ordinance (Cap. 86) had been effectively repealed.

The defendants in effect are raising an issue of public law involving an authority (the Chief Minister) which is not a party to this action by way of defence to this action commenced by the plaintiffs against them. Whether such a step is open to the defendants was not raised by Counsel for both parties. I had some doubt about it. Accordingly, both Counsel were recalled and invited to address me on the point.

Having heard the submissions of Counsel, I am of the view that it is improper for the defendants to raise the issue by way of a defence without making the relevant authority a party to the proceedings, and that as such, it would not be appropriate to deal with the issue. One of the fundamental principles in the concept of fair adjudication is *audi alteram partem* (no man shall be condemned unheard). This is one of the rules of natural justice that this Court has to observe. The point of defence raised by the defendants hits on the appointing authority which is not a party to this action. It would be a breach of the principle aforesaid if this Court were to adjudicate upon the matter without hearing the party whose action was challenged. The 3 cases relied on by the defendants, that is, *Ah Thian v. Government of Malaysia* [1976] 2 MLJ 112, *Hashim b. Saad v. Yahaya b. Hashim & Anor.* [1973] 2 MLJ 85 and *Yeoh Tat Thong v. Government of Malaysia & Anor.* [1973] 2 MLJ 86 are, in my opinion, of no assistance to the defendants because in all of them the authority concerned, that is, the Government of Malaysia, was a party to the actions.

Two recent cases dealt on the question of raising issues of public law by way of defence: *Wandsworth London Borough Council v. Winder* [1984] 3 AER 83 and *Avon County Council v. Buscott* [1988] 1 AER 841. Apart from themselves being distinguishable, as may be seen in the judgment of Lord Donaldson MR in *Avon's* case, *supra* , (at p. 845), the 2 cases differ from ours in that there the plaintiffs were the landowners/councils whose decisions were attacked and who, being parties to the actions, had the opportunity to defend themselves. Nevertheless, in the light of the arguments advanced before me, it would not be out of place to discuss them.

In *Wandsworth's* case, *supra* , the defendant, Winder, was a tenant of the local authority. His rent was increased and he refused to pay the increased rental. The council then sued him for both the arrears of rent and possession of the premises. The defendant defended the action and claimed that the decision to increase the rent was unlawful and that therefore he continued to have a valid tenancy in accordance with the terms in force before the

purported rent increase and that he did not owe any arrears. He also counterclaimed to the like effect. The council sought to strike out the defence and counterclaim on the ground that they were an abuse of the process of the Court, as public policy required a decision of a public authority to be challenged by way of judicial review. Putting it closer in line with the issue in our instant application, the question was whether the defendant, Winder, could raise the argument by way of defence. The House of Lords held that the defence could be raised as it could hardly be said that the defendant was abusing the process of the Court by defending himself. At first sight, *Wandsworth's* case, *supra* , would appear to be in favour of the defendants in our case. In fact it would not. In *Wandsworth's* case, *supra*, the council was the landlord who was also the plaintiff, and it made the decision increasing the rental which was impugned whereas in our instant case the appointing authority, the Chief Minister, is not a party to this action.

In *Avon's* case, *supra*, the defendants were trespassers living on land belonging to the plaintiff-council. They refused to leave and the council sought a summary order for possession under RSC Ord. 113 (English). The defendants did not deny that they were trespassers but they sought to challenge the council's decision to obtain orders for possession on the grounds that the decision was unreasonable and beyond the powers of the council. The Court of the first instance held that the matter complained of could only be raised in separate proceedings for judicial review. On appeal, the Court of Appeal upheld the decision. Lord Donaldson MR drew a distinction between *Wandsworth's* case and *Avon's* case and it would appear that whether a defendant could raise issue of public law by way of defence in an action by a plaintiff who also made the decisions that were challenged, depends on whether the defendant has a defence to the action on the merits. This is what Lord Donaldson said (p. 845):

> ... there is a fundamental difference between this case and *Winder's* case. Mr. Winder was seeking to raise a true defence. He was saying that he had a valid tenancy, that he did not owe any rent and accordingly, was not liable to eviction. It was a defence on the merits. In the present case the defendants do not allege any right to occupy the land and accordingly, do not deny that they are liable to be evicted. They do not suggest that they have any defence on the merits. What they say is quite different, namely that the council is entitled to enforce its rights. It is not entitled to come to the Court to seek an eviction order ... When a defendant is seeking, in effect, to strike out an action on the basis of a public law right, he should, in my judgment, proceed by way of an application for judicial review, thus ensuring that the matter is dealt with speedily as a preliminary point and in a manner which gives the public authority and the public which it serves the protections enshrined in the judicial review procedure.

In the instant case, it would have been different if the challenge were against the act of the plaintiffs. But this is not so. The defendants in the instant case are challenging the validity of the Gazette Notification Swk. LN4 of 25 January 1985 which was the act of an authority which is not party to this action.

It is a cardinal principle of justice that the party against whom a challenge is directed must be made a party to the proceedings so that he is afforded an opportunity to be heard. In my opinion, unless clearly invalid on its face (which I do not so find), the issue cannot or cannot be properly raised and adjudicated upon without joining the appropriate authority concerned.

I also cannot help entertaining doubt as to the *bona fide* and genuine desire of the defendants in raising the issue. Apart from the vague manner in which the issue was pleaded (see para. 5 of the defence and counterclaim reproduced above), the defendants must have, through

the proceedings particularly that on 21 October 1988, been aware of the non-joinder of the authority concerned exercising the power of appointment, yet no suggestion or attempt was made to rectify the situation.

In my opinion, therefore, unless the revocation is invalid on its face (which I find not), the revocation must be presumed to have been validly made and to continue in force unless and until it has been struck down by a competent Court after a fair and proper hearing of all parties concerned and it is improper to challenge the validity of the revocation of the repeal without having the revoking authority made a party to the action.

Repeal of Rent Control Ordinance - Rights acquired?

Next, it was contended for the defendants that assuming the Rent Control Ordinance (Cap. 86) had been properly repealed, the tenancy of the defendants in the name of Chop Tong Chiang remained unaffected. Three grounds were advanced for this contention:

(i) that Chop Tong Chiang was previously a protected tenant under the Rent Control Ordinance (Cap. 86) and remained a protected tenant despite the repeal of the said Ordinance;

(ii) reliance was placed on subsections (b), (c) and (e) of s. 10 of the Interpretation Ordinance (Cap. 1);

(iii) Article 13(1) and 13(2) of the Federal Constitution.

Section 10(b), (c) and (e) of the Interpretation Ordinance (Cap. 1) provides:

10. The repeal of any written law shall not:

(a) ...

(b) affect the previous operation of any written law so repealed, or anything duly done or suffered under any written law so repealed;

(c) affect any right, power, obligation, restriction or liability acquired, accrued, imposed or incurred under any written law so repealed;

(d) ... ; or

(e) affect any ... remedy in respect of any such right ... as aforesaid; and any such ... remedy may be ... continued or enforced ... as if the repealing written law had not been passed.

Article 13 of the Constitution of Malaysia provides:

13(1) No person shall be deprived of property save in accordance with law.

(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

It seems to me clear from the arguments of Counsel for the defendants that the basis of the contentions rests on whether the defendants, or more precisely, the 4th defendant, Chop Tong Chiang, had previously been a protected tenant under the Rent Control Ordinance and had acquired the right of a protected tenant thereunder. If the defendants had not, then the question of protection by virtue of the provisions of the Interpretation Ordinance and the Federal Constitution as contended on behalf of the defendants, does not arise since there is nothing to protect. For this purpose, it has, of course, to be assumed that Chop Tong Chiang could hold the tenancy and that the provisions of the said Ordinance and the Federal Constitution cited were capable of protecting the right.

So far as is relevant, the term "tenant" is defined under s. 3 of the repealed Rent Control Ordinance to mean "the tenant of premises in respect of which a tenancy exists and includes a statutory tenant". It covers beyond the category of statutory tenants. For the defence, it had not been submitted clearly what it meant by "protected tenant" under the said Ordinance. If by that is meant the general protection by virtue of the provisions of the Ordinance, the defence must fail. Section 10 of our Interpretation Ordinance is substantially the same as s. 38(2) of the English Interpretation Act 1889. In *Sifam Electrical Instrument Co. Ltd. v. Sangamo Weston Ltd.* [1971] 2 AER 1074 (copyright case) it was held to the effect that the right to exercise a defence was not a "right ... accrued" and could only exist as long as the statute giving it remained in force. It is not necessary to narrate the complex facts in that case. So far as is relevant, the essence of the matter is that s. 10 of the Copyright Act 1956 (English) as in force in 1967, afforded the defendant certain defence to the infringement of copyright. In October 1968, the said s. 10 was amended resulting in the loss of protection to the defendant. The question was whether the defendants had acquired a 'right' to infringe the plaintiffs' copyright which by virtue of s. 38(2)(c) of the Interpretation Act 1889 could not be affected by the subsequent amendment of s. 10 of the 1956 Act with the result that the plaintiffs having destroyed their copyright, the defendants had thereby acquired a right to do forever acts which would otherwise have infringed that copyright. At p. 1079 Graham J said:

> ... in my judgment, the giving of a defence by a statute in particular circumstances, the effect of which is that the plaintiff cannot exert his rights in those circumstances, does not mean in the absence of express words that those rights are forever destroyed and cannot ever be revived by an amending statute. As a matter of construction it seems to me that the provision of the 'shield' by the words of unamended s. 10 is a method by which the legislation shows its intention to protect the defendant for the time being whilst the statute is in force without giving him any right which extends beyond the expiry of the statute. If the latter had been the intention it would have been very simple to have said so. The provision of such a defence does not, in my judgment, enable the defendants to acquire a right within the meaning of s. 38(2)(c) of the Interpretation Act 1889, as will be discussed more fully later. The effect is, therefore, in my judgment, that so long as the unamended s. 10 was in force the plaintiffs' rights to industrial exploitation by way of application of the design to meters under the Copyright Act 1956, were not wholly destroyed forever but were in suspense. This is, of course, also on the assumption that the defendants are correct that the design was one which could have been registered under the Registered Designs Act 1949. As soon, however, as the original s. 10 was superseded by the amended s. 10 the plaintiffs' rights under the Copyright Act 1956, revived and can be enforced, and the shield given by the original s. 10 is no longer available to the defendants.

Sifam's case, *supra* , was on amendment of statute as opposed to repeal, but the principle is the same.

Abbott v. Minister of Lands [1895] AC 425 PC established that the mere right, existing at the date of a repealing statute, to take advantage of provisions of the repealed statute is not a right accrued. The dictum of Lord Herschell at p. 431 which was applied in *Sifam's* case, *supra*, reads:

> It may be, as Windeyer J observes, that the power to take advantage of an enactment may without impropriety be termed a "right". But the question is whether it is a "right accrued" within the meaning of the enactment which has to be construed. Their Lordships think not ...

On the other hand, if it were the case of the defendants that a statutory tenancy had been acquired, the argument must also fail. In my view, on the evidence as adduced, no status of a statutory tenant under the Rent Control Ordinance (Cap. 86) had been acquired. Section 18 thereof set out persons who fell within the category of "statutory tenants". The relevant provision was para. (a) which read:

18. The following persons are statutory tenants under this Ordinance, namely -

(a) any tenant of premises who remains in possession thereof after the determination by any means of his tenancy and who cannot, by reason of the provisions of this Ordinance, be deprived of such possession by his landlord;

Before a person can claim to be a statutory tenant, he must fulfil 4 conditions:

(a) he must have been a tenant of the premises;

(b) his tenancy must have been determined (not by assignment or anything of that sort);

(c) he must have remained in possession of the premises after the determination of the tenancy; and

(d) the provisions of the Ordinance must prevent him being deprived of possession by the landlord of the premises.

See *M.K. Ramasamy Pillai v. Meyappa Chettiar & Anor.* [1955] 21 MLJ 105 where similar provision in the Control of Rent Ordinance 1948 (Malayan) as s. 18(a) quoted above was considered. See also *Tan Khio Soei & Anor. v. Ban Hin Lee Bank Ltd.* [1964] 30 MLJ 71 FC.

So far as the affidavit evidence goes, the defendants went into possession of the premises in about 1930 (that is, before the Rent Control Ordinance (Cap. 86) came into being) and they claimed to be "tenant" within the meaning of the term defined in s. 3 of the Ordinance. They did not clearly state when their tenancy began. But whether the tenancy commenced before or after the coming into force of the Rent Control Ordinance (Cap. 86)) (for which see the First Schedule to the Ordinance), it is clear that the tenancy was a contractual one and on the evidence, it was terminated on 30 September 1985 or thereafter, by notice to quit dated 2 August 1985 (that is, the termination was after the repeal of the Ordinance (Cap. 86). On the evidence, therefore, the defendants have failed to show that there exists triable issue that they were statutory tenants.

In considering s. 38(2)(c) of the English Interpretation Act 1889, it was laid down in *Hamilton Gell v. White* [1922] 2 KB 422 CA that the provisions did not preserve abstract rights conferred by the repealed Act, but only applied to specific rights given on the happening of events specified in the statute. The following dictum of Aktins LJ (p. 431) was cited with approval in *Kenderaan Bas Mara v. Yew Bon Tew & Anor.* [1980] 1 MLJ 311 FC:

> It is obvious that that provision was not intended to preserve the abstract rights conferred by the repealed Act, such for instance as the right of compensation for disturbance conferred upon tenants generally under the Act of 1908, for if it were the repealing Act would be altogether inoperative. It only applies to the specific rights given to an individual upon the happening of one or other of the events specified in the statute.

In the instant case no triable issue has been shown by the defendants respecting the allegation of the existence of any acquired or accrued right to remain in possession and occupation of the premises or as protected tenants by virtue of s. 10 of the Interpretation Ordinance (Cap. 1). Neither had the defendants shown by evidence what precisely were "the previous operation" or the thing duly done under the Rent Control Ordinance (Cap. 86) or, if there were, that they should remain unaffected by reason of s. 10(b) of the Interpretation Ordinance. Since the defendants have failed to satisfy me of the existence of any triable issue about any acquired or accrued right, no question of 'remedy' in respect of the right being unaffected under s. 10(e) of the said Ordinance arises.

Similarly, as the defendants have failed to show the existence of any triable issue about the acquisition of any protected tenancy right, the question of wrongful deprivation thereof in contravention of Article 13 of the Federal Constitution also does not arise.

Notice To Quit - Validity

Another contention of the defendants was on the notice to quit. The notice given was applicable to a monthly tenancy. For the defendants it was firstly argued that the notice was ineffective for determining the tenancy on the ground that the 4th defendant had, despite the repeal of the Rent Control Ordinance (Cap. 86), acquired a protected tenancy. I have ruled against the defendants on the issue of acquisition of protected tenancy. This point must therefore fail.

The next argument was: assuming that no right of protected tenancy had been acquired (which I, in fact, have just held), the notice to quit was nevertheless bad in that the 4th defendant, as alleged by the defendants, was, prior to the repeal of the Rent Control Ordinance, a tenant from year to year by reason of the facts (which were undisputed) that the 4th defendant had been a tenant since about 1930 and that the tenancy was not for any specific period. The Australian case of *Moore v. Dimond* [1929-30] 43 CLR 105 was cited. With respect, I am unable to accept that the 4th defendant had been a tenant from year to year. In Hill and Redman's *Law of Landlord And Tenant* 16th Edn., p. 44 it is stated:

> (1) A tenancy from year to year may be created by statute or by express agreement, or arise by implication.
>
> (2) ...
>
> (3) A tenancy from year to year arises by presumption of law when a person who has entered upon premises, or, having been tenant, has remained in possession of premises with the consent of the landlord in such circumstances as to be in the first instance tenant at will, or, in the case of holding over, tenant at sufferance subsequently pays rent with reference to a yearly holding, provided that there are no circumstances to rebut the presumption.

In the instant case, there is no question of such a tenancy created by statute or express agreement. Nor would a tenancy from time to time be implied because, apart from the lack of anything showing that the 4th defendant had been a tenant at will or at sufferance, there is no evidence of rental being paid **with reference to a yearly holding.**

In Woodfall's *Law of Landlord And Tenant* 28th Edn., Vol. 1, para. 1-0642 it has been stated "A demise of houses or of rooms at a monthly or weekly rent affords a presumption of a monthly or weekly tenancy." Case like *Lee Ah Low v. Cheong Lep Keen & Anor.* [1970] 1 MLJ 7 FC, *Leong Lep Keen & Anor. v. Tan Tin Kek* [1968] 2 MLJ 126 and *Adler v. Blackman* [1952] 2 AER 945 also indicate that provisions of rental (that is, annually, monthly or weekly) and the manner they were paid are important factors in determining whether the tenancies are monthly tenancies.

In our instant case, although the 4th defendant had been a tenant since about 1930, the tenancy was not for any specified period but had all along been at a monthly rent and the rentals had been paid monthly. On the evidence I entertain no doubt that the tenancy was a monthly tenancy and I so hold. Being a monthly tenancy, the proper notice, unless otherwise agreed by the parties, (on the evidence, none in the instant case) is a month's notice expiring at the end of the period of the tenancy. *Ko Teck Kin v. Watkinson* [1961] 27 MLJ 73; *Muhamed Din v. Sockalingam Chettiar* [1946] 12 MLJ 134. In the instant case the notice to quit is, in my judgment, a good one and effectively terminated the tenancy.

Moore v. Dimond, supra , clearly is distinguishable. There the agreement (renewed) was for a lease of 5 years though rental was to be paid weekly.

The defendants, I am aware, have made counterclaims in the form of declarations. However, the mere fact that counter-claims were made does not necessarily entitle them to the grant of leave to defend, *Anglo-Italian Bank v. Wells & Davies* [1878] 38 LT 197, particularly so where, as in the instant case, the declarations sought are, in substance, based on the defences that have been disposed of as constituting no triable or arguable issues.

There is, in my opinion, no triable or arguable issue respecting the termination of the tenancy. I hold that the plaintiffs are entitled to possession of ½ undivided right title share and interest in the shophouse. (Prayer (A)(1) of the summons).

As to the claim of mesne profit, the plaintiffs ask for the mesne profit to be assessed. While it is true that as a matter of law, mesne profit need not necessarily commensurate with the rent reserved in the expired tenancy agreement, the plaintiffs in the instant case have not at all averred in their statement of claim any basis or particulars which are material for the assessment of the mesne profit. Neither did the defendants suggest that the rental of the shophouse had fallen below the rate agreed in the tenancy between the parties.

As regards the date from which mesne profit is to run, Counsel for the defendants contended that it should commence from the date of service of the writ on the defendants, citing *Canas Property Co. Ltd. v. K.L. Television Services Ltd.* [1970] 2 QB 433. With respect, I disagree. That action was founded on forfeiture upon breach of covenant and the rental was payable in advance. The decision in that case formulating the practice that mesne profit was to begin from the date of service of the writ must be read on that basis. In our present case, the action is founded on termination of tenancy by a notice to quit. Upon termination by such notice, the legal right of the defendants to occupy the plaintiffs' ½ share of the shophouse ceased.

In the circumstances, I will not direct the mesne profit to be assessed but would order the defendants to pay the plaintiffs mesne profit at the rate of RM170 per month (the agreed monthly rental) from 1 October 1985 till possession of ½ of the shophouse is delivered up.

I should perhaps mention that the plaintiffs deposed to "the rates and quit rent" relating to the shophouse "continue to be shared by the plaintiff society", whatever that may mean (see para. 12 of the plaintiffs' joint affidavit made on 15 October 1986). To this, the defendants retorted that the rates and quit rent had always been paid by the 1st defendant and photocopies of some receipts of payment for the rates were exhibited to which the plaintiffs did not reply. (see para. 10 of Ngui Kwong Yaw's affidavit affirmed on 30 April 1987). I find them to be of no relevancy. They form no part of the claim or the counterclaim.

There remains the claim for partition or sale of the shophouse. To begin with, I am not certain if the plaintiffs still intend to pursue the claim now that their claim for possession has been granted. This is because in the submission on their behalues Counsel stated: "If Court is against me on claim of possession, the plaintiffs are also claiming an order of partition against the 1st defendant."

Assuming the plaintiffs still persist on the claim of partition or, alternatively, sale, Counsel has made clear that they were not relying on s. 129 of the Land Code. In the circumstance the said s. 129 need not be considered; nor the Land (Control of Sub-division) Ordinance (Cap. 82) to which the shophouse is subject, in view of subsection (4) of the said s. 129.

There can, of course, be no dispute that this Court has the jurisdiction to order partition or sale of land. See s. 25(2) and item 3 of the Schedule to the Courts of Judicature Act 1964. The question is: ought partition or the alternative relief of sale be granted on the evidence as adduced in this O. 14 application? Having perused the statement of claim and the affidavit evidence adduced in support of the application, the action principally one of landlord and tenant. The relief of partition and of sale in the alternative claimed in para. 6(2) of the statement of claim is not in any way backed up or supported by any averments in the statement of claim. Though para. 5 thereof contends the exclusion or deprival of the plaintiffs' use of its share of the shophouse by the defendants, the averment is capable of being construed as supporting the relief of possession. The defendants, on the other hand, deny the plaintiffs' entitlement to the relief claimed (para. 6 of the defence and counterclaim). On the pleadings and the evidence as adduced, I am not inclined to grant summarily the relief of partition or sale. There ought to be a trial respecting thereto if the plaintiffs persist on the claims. I find no assistance in *G.P. de Silva & Ors. v. Chua Yam Thong* [1962] 28 MLJ 236 cited for the plaintiffs. In that case the plaintiffs claimed for an account of profits allegedly received by the defendant, payment of their share and damages. They did not claim partition. Nor was any order or partition made. The Court merely gave effect to the agreement of division of the land found to be existing on evidence as adduced, and dismissed the plaintiffs' claim. I leave it to the plaintiffs to decide if they wish to proceed to trial respecting the relief of partition or sale as sought.

As regards costs, since the plaintiffs succeed partially in the application, I order ½ of the costs of and occasioned by the application be paid by the defendants to the plaintiffs. In the absence of an agreement, such costs are to be taxed.

There will be judgment for the plaintiffs against the defendants for possession of ½ undivided right title share and interest on the shophouse and mesne profit at the rate of RM170 per month from 1 October 1985, until possession is delivered to the plaintiffs.

The defendants may defend the action as to the remaining relief claimed in the statement of claim.

The plaintiffs and the defendants do respectively within 30 days serve upon each other a list verified by affidavit stating what documents are or have been in their possession custody or power relating to any matter in question in this action and there shall be inspection thereof within 14 days thereafter.

The action be set down within 60 days, the estimated length of the trial being 4 days.

The costs of and occasioned by the application be taxed if not agreed, and ½ thereof be paid by the defendants to the plaintiffs.

Also found at [1992] 4 CLJ 2013